Filed 2/2/05 In re D.B. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.B., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. BRIDGETT H., Defendant and Appellant.	E035799 (Super.Ct.No. IJ4436) OPINION

APPEAL from the Superior Court of Riverside County. H. Morgan Dougherty, Judge. Reversed and remanded with directions.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

William C. Katzenstein, County Counsel, Julie Koons Jarvi, Deputy County Counsel, and Robert Pepper, Deputy County Counsel, for Plaintiff and Respondent.

Sharon M. Jones, under appointment by the Court of Appeal, for Minor.

Bridgett H. (hereafter mother) appeals from the order terminating her parental rights with respect to her son, D.B. (hereafter D.), born in 2003. Mother's only contention in this appeal is that the Department of Public Social Services (DPSS) failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We agree and therefore will reverse.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts are that when D. was born drug addicted in January 2003, mother was involved in an open family reunification plan with her 12-year-old son, T. At the detention hearing in February 2003 on the Welfare and Institutions Code section 300[1] petition filed regarding D., mother advised the court that she was part Cherokee and Blackfoot Indian.[2] As a result, the trial court directed DPSS to give notice to the Bureau of Indian Affairs (BIA). In accordance with the trial court's order, DPSS mailed notice of the jurisdiction and disposition hearings to Indian Child and Family Services, the BIA, the Cherokee Nation, and the Blackfoot tribe.

The social worker's report prepared for the six-month review hearing held on October 23, 2003, states, "A letter was received from the Blackfeet [*sic*] Tribe in

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[1] All further statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

[2] The reporter's transcript of the hearing in question is not included in the record on appeal. The clerk's minute order includes the entry, "Mother states possible American Indian Heritage." The social worker's report for the jurisdiction hearing includes mother's statement that "she was told she is part Cherokee and Blackfoot. She states that she is not registered with the tribes as far as she knows."

Browning, Montana indicating that additional information would be required to determine tribe affiliation and the mother . . . stated that she had no additional information to provide and does not believe that the family has ever registered with the tribe." At the six-month review hearing, the trial court, after making the requisite findings, terminated mother's reunification services and set the section 366.26 selection and implementation hearing.[3] Whether based on the letter from the Blackfoot Tribe, or other information not disclosed in the record, DPSS apparently concluded that ICWA did not apply, as evidenced by the fact that it did not give notice of the six-month review hearing or the selection and implementation hearing to Indian Child and Family Services, the BIA, the Cherokee Nation or the Blackfoot Tribe.

Mother filed a section 388 petition before the selection and implementation hearing asserting that she had made progress in her drug rehabilitation plan and requesting that reunification services be reinstated as to both D. and T. Following a contested hearing, the trial court denied the petition as to D. The court then found that D. was adoptable, selected adoption as the permanent plan, and terminated mother's parental rights to D. Mother appeals from that order.

DISCUSSION

Mother's only contention in this appeal is that DPSS failed to comply with the notice requirements of ICWA. We agree.

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[3] Mother was in a drug rehabilitation program following her arrest, shortly after this dependency was initiated, for the possession and sales of drugs.

Under ICWA, when a child subject to a dependency proceeding is or may be an Indian child, as defined in the act, each tribe of which the child might be a member or eligible for membership must be notified of the dependency proceeding and of the tribe's right to intervene in the proceeding. If the identity of the tribe cannot be determined, notice must be sent to the Secretary of the Interior through the BIA. (25 U.S.C. § 1912; Cal. Rules of Court, rule 1439(f).) If proper notice under ICWA is not given, the child, the parent, or the tribe may petition the court to invalidate the proceeding. (25 U.S.C. § 1914.)[4]

Under title 25, section 1912(a) of the United States Code, the duty to give notice initially arises only "where the court knows or has reason to know that an Indian child is involved" in the proceeding. (25 U.S.C. § 1912(a).) As defined in ICWA an "Indian child" is a child who "is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).) Under rule 1439 of the California Rules of Court, which is directed at ensuring compliance with ICWA, a court has reason to know a child might be an Indian child if, among other things, "[a] party . . . informs the court or the welfare agency or provides information suggesting that the child is an Indian child" (Cal. Rules of Court, rule 1439(d)(2)(A).) Simply stated, the duty to give notice under ICWA arises

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[4] For this reason we must reject DPSS's assertion that mother forfeited the ICWA claim by not raising it in the trial court. Simply put, "The notice requirements serve the interests of the Indian tribes 'irrespective of the position of the parents' and cannot be waived by the parent. [Citation.]" (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1266,

[footnote continued on next page]

when there is information suggesting the child is either a member of a tribe or eligible for membership and the biological child of an Indian tribe member.

There was such information in this case. As noted above, the social worker's report prepared for the jurisdiction hearing includes mother's statement that she had been "told she is part Cherokee and Blackfoot" but "that she is not registered with the tribes as far as she knows."[5] That information suggests that mother might be a member of a tribe or eligible for membership which, in turn, gives rise to a duty to give notice to the tribes in question.

Because we conclude that ICWA notice requirements were triggered in this case, the remaining question we must resolve is whether those requirements were satisfied. As pertinent to this issue, the record includes proofs of service by mail which reflect that DPSS served juvenile court hearing notices on the BIA, Indian Child and Family Services, Blackfeet Tribal [*sic*], and the Cherokee Nation.[6] In addition, the record includes certified mail return receipts from the Cherokee Nation, Indian Child and Family Services, Blackfeet Tribal [*sic*] and the BIA, all dated in late February 2003. There is no

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quoting *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421; accord, *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.)

[5] That same report includes the notation that ICWA "does or may apply."

[6] Mother contends that DPSS should have given notice not only to the Cherokee Nation but also the United Keetoowah Band of Cherokee Indians of Oklahoma and the Eastern Band of Cherokee Indians of North Carolina. All three tribes are included in the Federal Register list of federally recognized tribes. (See *In re Marinna J.*, *supra*, 90
[footnote continued on next page]

showing that DPSS actually served any of the noted entities with a copy of the dependency petition. Federal guidelines promulgated under ICWA provide that notice to the BIA should include a copy of the petition by which the proceeding was initiated. (*In re Kahlen W.*, *supra*, 233 Cal.App.3d at pp. 1422-1423.) Although the federal guidelines are not binding on state courts, their interpretation of the requirements of ICWA is entitled to great weight. (*Id*. at p. 1422, fn. 3.) There also is no showing that either the Cherokee Nation or the Blackfoot Tribe was advised of the right to intervene in the dependency proceeding. ICWA, and cases applying it, "unequivocally require actual notice to the tribe of both the proceedings and of the [tribe's] right to intervene. [Citations.]" (*In re Kahlen W.*, *supra*, 233 Cal.App.3d at p. 1422, italics omitted.) "Mere 'awareness' of the proceedings has not been deemed sufficient under the [ICWA]." (*Ibid*.)

The tribes also must be given notice of the right to an extension of time to prepare for the proceedings, and the right to petition for transfer of the proceeding to a tribal court. (*In re H. A*. (2002) 103 Cal.App.4th 1206, 1212.) There was no indication that any notice given in this case included this information. Nor is there any showing that the proper forms were used to provide notice. California regulations require that Form SOC 319 be used to give notice to a tribe (*In re Asia L.* (2003) 107 Cal.App.4th 498, 506) and that copies of the forms used to give notice be filed with the court. (*Id*. at pp. 508-509; *In*

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Cal.App.4th at p. 737; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 257, fn 6.) On remand, all three tribes should be given notice.

re Marinna J., *supra*, 90 Cal.App.4th at p. 739, fn. 4.) DPSS admits that the pertinent forms are not included in the record on appeal and that it does not appear that the Form SOC 319 was ever sent to the BIA or the tribes in question.

The social worker's report for the six-month review hearing, as noted above, includes the statement, "A letter was received from the Blackfeet [*sic*] Tribe in Browning, Montana indicating that additional information would be required to determine tribe affiliation and the mother . . . stated that she had no additional information to provide and does not believe that the family has ever registered with the tribe." That notation supports an inference that the Blackfoot tribe received an inquiry from DPSS regarding mother's membership in the tribe. However, as we have discussed, ICWA notice requirements are more extensive than merely inquiring about a parent's tribal membership. Moreover, the record does not include any indication that the Cherokee Nation responded to DPSS other than to return the certified mail receipt. The record simply fails to disclose whether the tribes received the notice required under ICWA.

"Since the failure to give proper notice of a dependency proceeding to a tribe with which the dependent child may be affiliated forecloses participation by the tribe, notice requirements are strictly construed. [Citation.]" (*In re Samuel P.*, *supra*, 99 Cal.App.4th at p. 1267.) Therefore, "failure to provide proper notice is prejudicial error requiring reversal and remand. [Citations.]" (*Ibid*.)

DISPOSITION

The order terminating mother's parental rights is reversed and the matter is remanded to the juvenile court. On remand, the juvenile court must order DPSS to provide proper notice under ICWA to each of the three Cherokee tribes listed in the Federal Register and to the Blackfoot Tribe. If, after receiving notice under ICWA, no tribe indicates that D. is an Indian child within the meaning of ICWA, then the juvenile court shall reinstate the order terminating mother's parental rights.

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/s/ McKinster
J.

I concur:

/s/ Hollenhorst
Acting P.J.

RICHLI, J., Concurring.

I agree that there is insufficient evidence of substantial compliance with the notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (the ICWA). Although some token notice was given, it did not include sufficient information about the nature of the proceedings; it also did not include information reasonably necessary to enable a tribe to determine whether D.B. was a member or eligible to become a member, even though the record demonstrates that such information (including the names of the mother's parents and grandparents) was available. Accordingly, I concur in the majority opinion, except as noted below.

I write separately to emphasize that "[s]ubstantial compliance with the notice requirements of ICWA is sufficient. [Citation.]" (*In re Christopher I*. (2003) 106 Cal.App.4th 533, 566; accord, *In re Jonathan D*. (2001) 92 Cal.App.4th 105, 110; *In re Kahlen W*. (1991) 233 Cal.App.3d 1414, 1421-1422; see also *In re Suzanna L*. (2002) 104 Cal.App.4th 223, 237 [Fourth Dist., Div. Two].) I am concerned that the majority opinion could be read to require strict compliance -- possibly even hyperstrict compliance, i.e., above and beyond what the ICWA itself actually requires.

The majority opinion declares that "'notice requirements are strictly construed,'" and therefore the "'failure to provide proper notice is prejudicial error requiring reversal and remand,'" quoting *In re Samuel P*. (2002) 99 Cal.App.4th 1259, 1267. (Maj. opn. at p. 7.) *Samuel P.* cited *In re Desiree F*. (2000) 83 Cal.App.4th 460, which stated: "The notice requirement is not satisfied unless there is strict adherence to the *federal statute*

. . . . [Citations.]" (*In re Desiree F*., at pp. 474-475, italics added.) The federal statute requires notice "of the pending proceedings and of [the tribe's] right of intervention." (25 U.S.C. § 1912(a).) The failure to provide such notice is reversible error. However, the failure to provide notice in accordance with the myriad other requirements imposed by federal regulations, federal "Guidelines" (44 Fed.Reg. 67584 (Nov. 26, 1979)), and Rule 1439 of the California Rules of Court is not reversible per se.

For example, the majority opinion suggests that the failure to use form SOC 319 was, in itself, reversible error. (Maj. opn. at pp. 6-7.) At one time, the state Department of Social Services's Child Welfare Services Manual of Policies and Procedures "require[d]" the use of forms SOC 318 and SOC 319. (*In re Asia L*. (2003) 107 Cal.App.4th 498, 506; see also *In re C.D.* (2003) 110 Cal.App.4th 214, 223.) It is not at all clear that this manual has the force of law. (See Welf. & Inst. Code, § 10554.) Even if it does, however, as long as the requisite notice is given, the failure to give it on the right form would be, at most, an error of state law, not a violation of the ICWA. Hence, the error would not require reversal unless it resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.)

Incidentally, the SOC 318 and SOC 319 have been superseded by the SOC 820 (<http://www.dss.cahwnet.gov/pdf/soc820.pdf>, as of Jan. 26, 2005), which in turn has been superseded by Judicial Council form JV-135. (<http://www.courtinfo.ca.gov/forms/documents/jv135.pdf>, as of Jan. 26, 2005.) Ideally, on remand, the Department will use the Judicial Council form. It would be premature, however, for us to declare what the consequences will be if it fails to do so.

Finally, the majority opinion states that, on remand, ICWA notice must be given to all three Cherokee tribes, as well as to the Blackfeet Tribe[1] and the Bureau of Indian Affairs (the BIA). (Maj. opn. at p. 5-6, fn. 6.) I disagree. The ICWA requires notice to the "child's tribe." (25 U.S.C. § 1912(a).) However, it also provides that "[i]f the identity or location of . . . the tribe cannot be determined, such notice shall be given to the [BIA] . . . ." (*Ibid*.; accord, 25 C.F.R. § 23.11(b); *In re Louis S.* (2004) 117 Cal.App.4th 622, 632-633.) If a child has ties to two or more *identifiable* tribes, the court must determine with which tribe the child "has the more significant contacts . . . ." (25 C.F.R. § 23.2.) Thus, notice must be given to each such tribe.

A generic term such as "Cherokee," however, does not suffice to identify a tribe. (*In re C.D.*, *supra*, 110 Cal.App.4th at p. 227 [mother identified tribe as "Cherokee"; giving notice to some but not all Cherokee tribes was not error because notice was also given to the BIA]; *In re Edward H*. (2002) 100 Cal.App.4th 1, 4 [father identified tribe as "Choctaw"; giving notice to some but not all Choctaw tribes was not error because notice was also given to the BIA].) A social services agency cannot even be sure that all Cherokee tribes have "Cherokee" in their names. Could "Big Lagoon Rancheria,

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[1] I have no wish to take up the cudgels in the debate over whether the plural of Blackfoot is Blackfoot or Blackfeet. In using the term "Blackfeet Tribe," I am simply following the tribe's official listing in the Federal Register. (Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 68 Fed.Reg. 68180 (Dec. 5, 2003); see also Indian Child Welfare Act; Receipt of Designated Tribal Agents for Service of Notice, 68 Fed.Reg. 68408 (Dec. 8, 2003).)

California" be a Cherokee tribe? Are the "Confederated Tribes of the Goshute Reservation, Nevada and Utah" Cherokee?

Here, because the mother specifically identified the Blackfeet Tribe, that tribe was entitled to notice. However, because she identified the other tribe only as "Cherokee," the Department did not have to give notice to any particular Cherokee tribe, as long as it gave adequate notice to the BIA. On remand, the Department probably should give notice to all three Cherokee tribes, but only out of an excess of caution.

RICHLI
J.